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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT W. WAYMER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHANIE E. PARKER
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
3500 One Peachtree Center
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 521-3939

BARBARA MCDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1346, which defines mail and wire fraud as including schemes to deprive others of "the intangible right of honest services," denies public officials and other fiduciaries prosecuted under its authority their Fifth Amendment due process right to notice of what conduct constitutes a crime.

2. Whether a public official who has failed to fully disclose a private business relationship may be convicted of mail or wire fraud for depriving his constituents of "the intangible right of honest services," 18 U.S.C. § 1346, absent any finding that he sought to use the authority of his office to promote the private business relationship.

PARTIES TO THE PROCEEDINGS

The petitioner in this case, defendant and appellant below, is Robert W. Waymer. Respondent in this case, plaintiff and appellee below, is the United States.

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PETITION FOR A WRIT OF CERTIORARI

Robert W. Waymer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 55 F.3d 564 (11th Cir. 1995) and is reprinted beginning at page 1a of the appendix to this petition. There is no published opinion of the United States District Court for the Northern District of Georgia, the court in which petitioner was convicted and sentenced.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 16, 1995. The petition for rehearing was denied on September 7, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The provisions at issue are the Fifth Amendment Due Process Clause (U.S. Const. Amend. V) and 18 U.S.C. § 1346 (1988). These provisions are reprinted in the appendix to this petition beginning at page 27a.

STATEMENT OF THE CASE

This case presents a Fifth Amendment challenge to 18 U.S.C. § 1346, which defines mail and wire fraud to include schemes to deprive others of "the intangible right of honest services." Petitioner contends that Section 1346 is unconstitutionally vague because it does not adequately notify public officials, such as himself, and other fiduciaries of the circumstances in which a mere failure to disclose information may constitute a crime.

In view of the vagueness of Section 1346 and the judicially created "honest services" doctrine that preceded it, the circuits might be expected to have adopted conflicting standards for criminal liability. And they have. The Eighth Circuit, for example, has required a showing not only that a public official failed to disclose a personal business relationship, but also that he sought to exercise the authority of his office to promote that relationship. The Eleventh Circuit in this case refused to require such a showing.

This Court's intervention is needed in order to protect public officials and other fiduciaries from being prosecuted for mail and wire fraud under a statute that is unconstitutionally vague. At a minimum, the Court should resolve the circuit conflict as to whether a public official may be convicted of mail or wire fraud under the "honest services" doctrine for failure to disclose a

personal business relationship, even when he has not been found to have engaged in any official act to advance that relationship.

* * *

Petitioner Robert Waymer, a college professor and real estate broker, was a member of the Atlanta Board of Education. App. 1a. He was first elected to the school board in 1982 and served until his indictment in this case.

This case arose out of petitioner's business relationship with Buddy Allen, the president of Peatross, a company that provided sanitation and pest control services. App. 1a-2a. Originally, John Assmar, an Atlanta real estate broker, had an agreement with Allen, whereby Assmar would obtain service contracts for Peatross in return for 15% of the proceeds from those contracts. App. 1a. In 1986, Assmar obtained a contract for Peatross with the Atlanta school district to provide sanitation and pest control services to a few schools. App. 1a-2a. By 1988, Peatross was providing services to all 113 schools in the district. App. 2a.

Assmar died in June 1988. *Id.* Petitioner subsequently informed Allen that he and Assmar had been business partners and proposed that he assume Assmar's position with respect to the school contracts. *Id.* In late 1988, Allen agreed to petitioner's proposal, including paying him 15% of the contract proceeds, provided that the school district did not object to petitioner's doing business with Allen. *Id.*

Petitioner told the associate superintendent of schools, Dr. Woodrow Wilson, that he wanted to engage in business with a person who had a contract with the school district. *Id.* Dr. Wilson explained that petitioner could do business with such a contractor, provided that the contractor secured the district's business through a sealed bid process. *Id.* Dr. Wilson advised petitioner to abstain from voting on any matter that came before the school board involving the contractor. *Id.* He also instructed petitioner to formally disclose the relationship. *Id.*

As requested by Dr. Wilson, petitioner wrote a letter to Dr. Wilson stating, truthfully, that he was engaged in business with Allen and his affiliated companies, including Peatross. *Id.* He stated that he had worked as a sales representative and consultant to Allen and his companies since 1986. *Id.* Dr. Wilson did not ask petitioner to disclose, and petitioner did not disclose, that he would receive 15% of Peatross's proceeds from the school contracts. *See* App. 2a-3a; R7 at 307 (trial testimony of Dr. Wilson). Nor did he disclose the amount of work that he would perform for Peatross or Allen in return for the payments. App. 3a.

In response to petitioner's disclosure, Dr. Wilson informed petitioner in writing that he would "not be in conflict in representing any company as long as the company goes through the seal [sic] bid process, you do not initiate any business for your client with the school system, and you do not represent your client in any real estate transaction concerning school property." Trial Ex. F. Dr. Wilson also reiterated that petitioner should abstain from voting on any matter involving Allen's businesses. *Id.*

Petitioner did not, in fact, vote on any matter that came before the school board that involved Allen or his companies, or do anything else to help Allen procure or retain contracts with the school district. *See* App. 12a; R7 at 339-41 (trial testimony of Mr. Griswell). In fact, when the school district renewed its contract with Peatross in 1990, the contract did not even come before the school board. *See* R7 at 339-41. According to the trial testimony of Wallace Griswell, the school administrator in charge of contract bidding, petitioner did not influence the renewal of the Peatross contract in any way. *Id.* Nor did petitioner solicit any new business for Allen from the school district. *Id.*; App. 12a.

Petitioner was charged in a superseding indictment with twenty-four counts of mail fraud in violation of 18 U.S.C.

§§ 1341 and 1346.[1] The indictment alleged two theories of fraud: first, that petitioner defrauded the citizens of Atlanta of their right to his "honest services," and, second, that petitioner defrauded Allen of money or property. The district court granted a judgment of acquittal on two of the mail fraud counts, and the jury deadlocked on the charges that petitioner defrauded Allen. However, the jury convicted petitioner on the remaining counts of defrauding the citizens of At' nta of the right to his honest services.

The government's theory was that petitioner, as a fiduciary to the Atlanta schools and the people of Atlanta, had failed to disclose material information to the people of Atlanta with the intent of defrauding them of their right to honest services. The supposedly material information consisted of both the amount of petitioner's commissions from Allen and the amount of work that petitioner performed for those commissions. The government contended that these omissions were material because, if the school district had known that petitioner was receiving 15% of Allen's contract proceeds for doing little or no work, the school district might have negotiated a lower contract price with Allen or re-bid the contracts.

On appeal, petitioner argued, *inter alia*, that 18 U.S.C. § 1346, the "honest services" provision, was unconstitutionally vague. The Eleventh Circuit rejected the argument summarily. App. 6a. The court simply stated that the mail fraud statute's specific intent requirement (*i.e.*, that the defendant specifically intended to defraud the victim) provided petitioner with sufficient notice of what conduct the statute prohibited. *Id.* The court also concluded, in another section of its opinion, that the information that petitioner failed to disclose was material, because the school

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[1] The same indictment also charged petitioner with eleven counts of money laundering based on his depositing checks from Allen into the bank account of petitioner's real estate business. This petition does not address the money laundering counts except to point out that they are necessarily predicated on petitioner's mail fraud convictions.

district might have renegotiated or rebid its pest control contracts had it known that Waymer was receiving a 15% commission for doing little work. App. 12a-13a.

The Eleventh Circuit did not address petitioner's additional argument that the trial court erred in refusing to instruct the jury that petitioner must have exercised the authority of his office on behalf of Allen or his companies in order to be convicted of mail fraud under the "honest services" provision.

REASONS FOR GRANTING THE WRIT

This case presents an issue vital to the ever increasing number of public corruption prosecutions brought by the federal government against state and local officials: Whether Congress's expansion of mail and wire fraud to include schemes to "deprive another of the intangible right of honest services" — without any specification of what constitutes the right or its deprivation — is so vague and amorphous as to violate the Due Process Clause of the Fifth Amendment. This Court in *McNally v. United States*, 483 U.S. 350 (1987), recognized the uncertain scope of such a judicially created proscription. The proscription is no less uncertain in the form codified by Congress in the wake of *McNally*.

The lower federal courts have struggled to define when a public official may be convicted of mail or wire fraud for depriving constituents of his "honest services." Those courts have not reached consistent or satisfactory conclusions. Among the issues on which the circuits are divided is whether a public official may be convicted of mail or wire fraud under the "honest services" doctrine for failing to disclose a personal business relationship even when he has not engaged in any official act to promote that relationship. Petitioner's mail fraud convictions could be sustained only because the Eleventh Circuit, unlike the Eighth Circuit, did not construe the mail fraud statute in this case as imposing such an "official acts" requirement.

This Court's intervention is necessary to prevent prosecutions of public officials, like petitioner here, for conduct that they could

not reasonably have known was prohibited under Section 1346. At a minimum, the Court should resolve the uncertainty as to whether a public official may commit mail fraud even when he has not sought to exercise the authority of his office to advance an undisclosed business relationship.

I. THIS COURT SHOULD DETERMINE WHETHER SECTION 1346'S PROSCRIPTION OF SCHEMES TO "DEPRIVE OTHERS OF THE INTANGIBLE RIGHT OF HONEST SERVICES" IS UNCONSTITUTIONALLY VAGUE.

This Court has explained that a vague criminal statute cannot withstand scrutiny under the Due Process Clause of the Fifth Amendment. A criminal statute will be held void for vagueness unless it "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see Connally v. General Constr. Co.*, 269 U.S. 385, 393 (1926) ("[t]he citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions").

Section 1346 is unconstitutionally vague under this standard. A public official or other fiduciary is not given any adequate notice of what conduct may constitute a violation of the statute. This creates the potential for federal prosecutors' "arbitrary and discriminatory enforcement" of Section 1346 against disfavored state and local officials.

A. The Uncertain Scope Of The "Honest Services" Doctrine Has Been Recognized By Judges And Legal Scholars.

A debate has long raged among federal judges and legal scholars as to whether Section 1346, or the judicially created doctrine that preceded it, defines a criminal offense with sufficient particularity.

It was the lower federal courts, not Congress, that created the crime of fraudulently depriving citizens of honest government. The courts construed the term "scheme or artifice to defraud" in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, to encompass schemes to deprive others of the intangible right of honest services. The "honest services" doctrine was first suggested in the early 1940s. *See, e.g., Shushan v. United States*, 117 F.2d 110, 115 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941). By 1987, there was a "unanimity of opinion in the lower courts . . . that intangible rights to 'good government,' 'honest and faithful services' of an employee, etc., could be the basis of a fraud conviction." Craig M. Bradley, *Foreword: Mail Fraud After McNally and Carpenter*, 79 J. Crim. L. & Criminology 573, 574 (Oct. 1988) [hereinafter "Bradley"].

Under the "honest services" doctrine, the United States was able to prosecute a public official for abuse of his position without having to prove the official's intent to cause economic harm to any victim. Moreover, when combined with fiduciary duty principles, the "honest services" doctrine allowed a public official, who was deemed a fiduciary, to be convicted of mail or wire fraud simply for failing to disclose information. The standard for criminal liability under the "honest services" doctrine seemed to devolve, in the words of one commentator, into "that of fair play, an obviously elusive standard upon which to make the question of criminal liability turn." John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 127 (1981) [hereinafter "Coffee"].

This Court brought an end to mail and wire fraud prosecutions under the judicially created "honest services" doctrine in *McNally v. United States*, 483 U.S. 350. In *McNally*, the Court ruled that the terms "scheme or artifice to defraud," as used in 18 U.S.C. § 1341, did *not* include a scheme to deprive others of the right to honest services. *Id.* at 361. According to the Court, when Congress amended the mail fraud statute in 1909 to prohibit both schemes "to defraud" and schemes to "obtain[ ] money or

property by means of false or fraudulent pretenses," Congress did not, as the lower courts had reasoned, intend to prohibit schemes to defraud others of something that was not "money or property."[2] The mail fraud statute thus must be read, said the Court, "as limited in scope to the protection of property rights." *Id.* at 360.

The *McNally* Court recognized the very real dangers that would be presented by construing the mail fraud statute to include the deprivation of an amorphous right to honest services: Any such construction of the statute would "leave[ ] its outer boundaries ambiguous and involve[ ] the Federal Government in setting standards of disclosure and good government for state and local officials." *Id.* The Court reiterated that point later the same year in *Carpenter v. United States*, 484 U.S. 19, 25 (1987), observing that a right to honest services is "too ethereal in itself to fall within the protection of the mail fraud statute."

In direct response to *McNally*, Congress enacted legislation in 1988 that defined a "scheme or artifice to defraud," for purposes of the mail, wire, and bank fraud statutes, to include schemes "to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. The statute says nothing more. Representative Conyers, who introduced Section 1346 (but who eventually voted against the bill that contained it), described Section 1346 as "restor[ing] the mail fraud provision to where [it] was before the *McNally* decision." 134 Cong. Rec. H11,251 (daily ed. Oct. 21, 1988) (Part II) (Statement of Rep. Conyers)).

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[2] The Court noted that fraud was commonly understood in 1909 to consist only of "'wronging one in his property rights by dishonest methods or schemes.'" *McNally*, 483 U.S. at 358 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). Congress's specific mention of schemes to "obtain[ ] money or property by means of false or fraudulent pretenses" was intended only to codify the holding of *Durland v. United States*, 161 U.S. 306 (1896), that the statute reaches false promises or representations as to the future. *McNally*, 483 U.S. at 357, 359.

B. The Ambiguity That This Court Recognized In The "Honest Services" Doctrine Persists In Section 1346.

The Court of Appeals acknowledged in this case that "'honest services' are not defined in the mail fraud statute." App. 5a. In fact, Section 1346 fails to provide public officials or federal prosecutors with any guidance whatsoever as to what "the intangible right of honest services" is, or what conduct may subject a public official to criminal liability for depriving his constituents of this right. Congress likewise offered "no helpful discussion on the floor or in the committee report on the meaning of the phrase ['honest services']." Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 Ariz. L. Rev. 137, 138 n.7 (1990) [hereinafter "Williams"].

The commentators have noted that a statute that does no more than proscribe schemes to deprive others of "honest services" does not adequately define criminal conduct, especially when applied to the activities of public officials and other political figures:

> [T]he term "honest services" does not clearly state the content of criminal conduct. "Honest services" is an evolving, aspirational term that describes a level of conduct that may never be attained. In addition, the term "honest," like the concept of good government, embodies a relative value. In real world politics, only a blurred and shifting line separates political corruption from political patronage, and honest from dishonest service.

Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 Harv. J. Legis. 153, 195-96 (1994) (footnotes omitted) [hereinafter "Moohr"]; *see also* Williams, 32 Ariz. L. Rev. at 151-52 (given the "considerable variation of views on the political acceptability" of such practices as patronage and violation of campaign promises, Section 1346 requires state and local politicians to engage in "too much guesswork in the interpretation of criminal statutes").

In the absence of any clarifying language in the text of the statute or its legislative history, courts have continued to look to the pre-*McNally* case law to determine what constitutes a Section 1346 violation. *United States v. Bryan*, 58 F.3d 933, 942 (4th Cir. 1995). As thoughtful federal judges and scholars have observed over the years, however, the judicially created "honest services" doctrine was itself vague and unconstrained. Indeed, this Court characterized the doctrine as "ethereal" and "ambiguous." *Carpenter*, 484 U.S. at 25; *McNally*, 483 U.S. at 360; *see* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Penn. L. Rev. 1007, 1030 (1989) ("What may have been decisive to the Court [in *McNally*] was its fear that the common law development of the mail fraud statute had become so unbounded that virtually any arguably unethical conduct could be brought within its penalty.").

An extensive discussion of the deficiencies in the pre-*McNally* "honest services" doctrine can be found in Judge Winter's dissenting opinion in *United States v. Margiotta*, 688 F.2d 108, 139-44 (2d Cir. 1982) (Winter, J., concurring in part, dissenting in part), *cert. denied*, 461 U.S. 913 (1983). The panel in *Margiotta* had affirmed a mail fraud conviction under the "honest services" doctrine of Joseph Margiotta, a local Republican Party official who had arranged for a town's insurance business to be placed with a particular insurance agent. The agent was to kick back a portion of the commissions to Margiotta's political allies. Margiotta was indicted, and ultimately convicted, on charges of defrauding the town, the county, and the state, together with their citizens, "of the right to have [their] affairs . . . conducted honestly, impartially, free from bribery, corruption, fraud, dishonesty, bias, and deceit" and "of the honest and faithful participation of [Margiotta] in [their] affairs." *Id.* at 140 (quotations omitted).

If such "sweeping charge[s]" based on a political official's mere "failure to say something" were sufficient to give rise to criminal prosecution and conviction, noted Judge Winter, "there is no end to the common political practices which may now be swept within the ambit of mail fraud." *Id.* For example, "[a]n

elected official who for political purposes performs an act imposing unnecessary costs on taxpayers is guilty of mail fraud if disclosure is not made to the public." *Id.* So, too, would be "a candidate who mails a brochure containing a promise which the candidate knows cannot be carried out." *Id.*

Judge Winter observed that the case law arising from public officials' prosecutions under the "honest services" doctrine — the case law that courts continue to rely on today in prosecutions under Section 1346 — "shows how little definition there is to these newly created obligations" to render honest services. *Id.* at 142. As he explained:

> Juries are simply left free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes. One searches in vain for even the vaguest contours of the legal obligations created beyond the obligation to conduct governmental affairs "honestly" or "impartially," to ensure one's "honest and faithful participation" in government and to obey "accepted standards of moral uprightness, fundamental honesty, fair play and right dealing."

Id. at 142-43 (quoting *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir.), *aff'd in relevant part*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980)); *see also United States v. Holzer*, 816 F.2d 304, 309 (7th Cir. 1987) (Posner, J.) ("honest services" doctrine could not properly be extended to "whatever is not a reflection of moral uprightness, of fundamental honesty, fair play and right dealing," because then "federal judges [would be put] in the business of creating what in effect would be common law crimes") (internal quotations omitted).[3]

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[3] This Court vacated and remanded *Holzer* for further consideration in light of *McNally*. 484 U.S. 807 (1987).

The "honest services" doctrine is no clearer today than in 1982 when Judge Winter was writing in *Margiotta*.[4] The mere fact that Congress added one more sentence to the Criminal Code — which simply defines a "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services," 18 U.S.C. § 1346 — does nothing to clarify public officials' obligations to render honest services. One continues to "search[ ] in vain for even the vaguest contours of the[se] legal obligations" in federal statutory or case law. *Margiotta*, 688 F.2d at 142-43.

The vagueness of Section 1346 has not gone unnoticed by legal scholars. Professor Moohr has characterized this new "statutory right to honest services" as "an undefined, amorphous right with uncertain boundaries." Moohr, 31 Harv. J. Legis. at 170-71. Similarly, Professor Williams has observed that Section 1346, "with its ambiguous language concerning 'intangible rights of honest services,' . . . expands the vagueness problems of the mail fraud statute." Williams, 32 Ariz. L. Rev. at 153. And Professor Bradley has deemed it "at best unseemly and at worst subject to reversal on vagueness grounds, for the government to prosecute people on [an 'honest services'] theory deemed 'ethereal' by the Supreme Court, whatever Congress says." Bradley, 79 J. Crim. L. & Criminology at 620 (quoting *Carpenter*, 484 U.S. at 25).

This case strikingly demonstrates the vagueness and malleability of the obligations imposed on public officials by Section 1346. It was never suggested that petitioner had made any affirmative misstatements to the school district, or to the citizens of Atlanta, regarding his relationship with Buddy Allen and his companies. To the contrary, the uncontested evidence established that petitioner had truthfully disclosed the existence of the relationship to the school district; the only question was

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[4] In fact, the Court of Appeals' discussion of petitioners' vagueness challenge to Section 1346 relied on the majority opinion in *Margiotta* and other pre-*McNally* cases. App. 5a, 11a-12a.

whether petitioner should also have disclosed such particulars as the amount of his commissions and the amount of work that he had to do to earn them. No state or local law imposed any clear obligation on school board members to disclose such details about their private business affairs. And, significantly, no evidence indicated that petitioner voted during his tenure on the school board on any matter involving Allen or his companies, or that he otherwise exerted any influence on their behalf with the school district. *See supra* at 4. Yet, simply because the prosecutor was able to convince a jury that petitioner should have told the school district more about his relationship with Allen and his companies than he did, petitioner is now serving a 33-month sentence in federal prison. A public servant is entitled to more notice than Section 1346 provides before his life, career, and reputation are devastated in this manner.

The court below, following the reasoning of the *Margiotta* majority, erroneously concluded that Section 1346 is not impermissibly vague because "to convict a person of mail fraud, the government must prove specific intent to defraud." App. 6a. But that is no answer to the pervasive vagueness of the statute. As Professor Moohr has explained:

> [I]t is difficult to understand how specific intent nullifies the notice prong of the vagueness test in the context of mail fraud. Defendants in political corruption cases may or may not intend to reap a personal financial benefit, but may not intend to defraud the state or citizenry of money or property, and in fact do not. It is also unlikely that political corruption defendants specifically intend to deprive the citizenry of their right to good government. . . . Finally, even if the defendants intended to divert funds, they arguably did not intend to violate the statute. It is, after all, possible to cause a result intentionally and yet be without fair warning that such conduct is criminal.

Moohr, 31 Harv. J. Legis. at 195 (footnote omitted); *see generally* Wayne Lafave & Austin W. Scott, Jr., *Criminal Law* 93-94 (2d ed. 1986) (commenting that unclear language is not

clarified by scienter requirement); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 345 (1952) (Jackson, J., dissenting, joined by Black and Frankfurter, JJ.) (arguing that statute's indefiniteness was not cured by fact that "conviction is authorized only for knowing violations").

II. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT OVER WHETHER A PUBLIC OFFICIAL MAY BE CONVICTED UNDER SECTION 1346 WHEN HE DID NOT USE HIS OFFICE TO PROMOTE HIS UNDISCLOSED PRIVATE BUSINESS INTEREST.

The lower federal courts have long wrestled with what conduct constitutes a violation of Section 1346 or the judicially created doctrine that preceded it. They have not reached consistent results. *See, e.g.*, Coffee, 19 Am. Crim. L. Rev. at 128 (noting that some circuits have "taken a more conservative view [than others] of an elected official's duty" to render honest services). The inconsistency of these decisions confirms that courts, prosecutors, and potential defendants alike do not have adequate guidance as to what constitutes a violation of Section 1346.

A particularly significant difference among the circuits for present purposes is whether, in circumstances where a public official has failed to disclose a private business relationship, the official must be shown to have exercised the authority of his office to advance that relationship. The Eighth Circuit, in circumstances strikingly similar to those presented in this case, has required such a showing. The Eleventh Circuit declined to do so here. This conflict among the circuits merits this Court's intervention.

In *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979), the majority leader of the Missouri House of Representatives received 10% commissions from an architectural firm that he recommended for state contracts. He did not disclose his interest in the contracts. In reversing Rabbitt's conviction for defrauding the citizens of Missouri of "their right to honesty and fairness in the conduct of his official duties," the Eighth Circuit emphasized that "Rabbitt

did not, in his official capacity, control the awarding of state contracts to architects." *Id.* at 1026. Nor was Rabbitt shown to have "failed to carry out the duties and responsibilities of his legislative office or leadership positions for the sake of [the architectural firm]." *Id.*

Similarly, in *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976), the Eighth Circuit reversed the mail fraud conviction of the chief plumbing inspector of the City of St. Louis, who had received gratuities from a company that sought plumbing permits from the City. The court emphasized that the gratuities had not been shown to have affected McNeive's job performance: "There is no evidence that McNeive deviated from the plumbing code in any respect. . . . McNeive was not derelict in any of his affirmative duties as Chief Plumbing Inspector." *Id.* at 1252.

Other circuits, in affirming mail and wire fraud convictions under the "honest services" doctrine, have also accorded significance to the fact that a public official not only failed to disclose a private business interest, but also exercised the authority of his office to advance that interest. *See, e.g., Bryan*, 58 F.3d at 937-39, 942; *United States v. Silvano*, 812 F.2d 754, 760 (1st Cir. 1987); *United States v. Lovett*, 811 F.2d 979, 985-86 (7th Cir. 1987).

Here, although petitioner urged on appeal that his conviction must be reversed because the jury was not required to find that he had taken any official action with respect to Allen or his companies, the Eleventh Circuit rejected the argument *sub silentio*.[5] The Court of Appeals could have done so only by concluding, contrary to the Eighth Circuit, that a public official's failure to disclose a private business relationship may constitute mail or wire fraud, even when the official does not use his position to advance that relationship. There was no evidence that

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[5] The argument that a public official's conviction of mail fraud under the "honest services" doctrine must be related to the performance of official duties was raised at pages 33-36 of petitioner's opening brief in the Court of Appeals.

petitioner used his position on the school board to assist Allen or his companies. *See supra* at 4. No contracts between the school district and Allen came before the school board during the entire period that petitioner was receiving commissions from Allen's company. *See supra* at 4. (One such contract was renewed during that period, but at the administrative level with no involvement by petitioner.) *See supra* at 4. Nor was any evidence offered that petitioner attempted to act behind the scene on Allen's behalf. In short, the government was not required to prove, and did not prove, that petitioner "failed to carry out the duties and responsibilities of his . . . office . . . for the sake of [Allen or his companies]." *Rabbitt*, 583 F.2d at 1026.

Clearly, then, petitioner could not have been convicted of mail fraud under the Eighth Circuit standard as articulated in *Rabbitt* and *McNeive*, because petitioner did not even attempt to exercise any control or influence over the school district's decisions as to whether, or on what terms, to contract with Allen and his companies.[6] At a minimum, then, the Court should grant certiorari in order to resolve the conflict between the Eighth and Eleventh Circuits over whether a public official commits mail fraud under the "honest services" doctrine merely by failing to disclose a private business relationship, notwithstanding that he did nothing in his official capacity to benefit that business.

III. THIS CASE PRESENTS IMPORTANT AND RECURRING LEGAL QUESTIONS.

This case presents important and recurring questions regarding the federal government's ability to prosecute public corruption by state and local officials. Federal prosecutions for public

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[6] Indeed, the government's case was weaker here than in *Rabbitt* for two reasons: First, whereas Rabbitt disclosed nothing about his commission arrangement with the architectural firm, petitioner disclosed some information about his relationship with Allen and his companies. And second, whereas Rabbitt attempted to influence the state's award of contracts to the architectural firm, petitioner did not attempt to influence the school district's contracts with Allen and his companies.

corruption (among officials at all levels) have increased dramatically in recent years, rising from 45 in 1970 to 968 in 1990. Moohr, 31 Harv. J. Legis. at 154 (citing Public Integrity Section, U.S. Dept. of Justice, Report to Congress on the Activities and Operations of the Public Integrity Section for 1990, at 24-25 (Sept. 1991)); *see also* Williams, 32 Ariz. L. Rev. at 139 (noting "recent expansive use of the [mail fraud] statute" in a variety of contexts). These prosecutions can be expected to continue to increase in the years ahead. This Court's guidance is required in order to assure that public corruption prosecutions occur under clear and consistent standards.

The need for clear and consistent standards is never greater than when the federal government prosecutes state and local elected officials for their conduct while in office. (A consequence of such prosecutions in many cases, as in this one, is the removal of the official from that office.) When the law under which such an official is prosecuted is vague and malleable, those who elected him may well suspect selective prosecution, based on the official's race, ethnicity, or political views. And they may, in some cases, even be right. *See, e.g.*, Williams, 32 Ariz. L. Rev. at 148 (suggesting that federal prosecution of former Illinois Governor Otto Kerner for mail fraud under "honest services" doctrine was politically motivated).[7]

In his dissenting opinion in *Margiotta*, Judge Winter expressed profound concern at the "honest services" doctrine's "potential for abuse, through selective prosecution." 688 F.2d at 143. As Judge Winter explained, this sort of amorphous "catch-all political crime" — which need be used only "when a particular corruption, such as extortion, cannot be shown or Congress has not specifically regulated certain conduct" — "lodges unbridled power in federal prosecutors to prosecute political activists." *Id.* at 144.

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[7] *See also* Moohr, 31 Harv. J. Legis. at 177 (in prosecutions of public officials under "honest services" doctrine, "prosecutors impose their personal and subjective standards of good government").

It thereby "creates a danger of corruption to the democratic system" itself. *Id.*

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

STEPHANIE E. PARKER
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
3500 One Peachtree Center
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 521-3939

BARBARA McDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioner

December 6, 1995

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT W. WAYMER,
Defendant-Appellant.

No. 93-9319.

June 16, 1995.

Appeal from the United States District Court for the Northern District of Georgia.

Before HATCHETT and COX, Circuit Judges, and JOHNSON, Senior Circuit Judge.

JOHNSON, Senior Circuit Judge:

In this appeal from the Northern District of Georgia, Robert W. Waymer seeks reversal of his convictions on twenty-two counts of mail fraud and eleven counts of money laundering. For the reasons stated below, we affirm.

I. STATEMENT OF THE CASE

A. *Factual Background*

Waymer was an elected member of the Atlanta Board of Education ("the Board"). Buddy Allen was the President and General Manager of Allen Service Company, the parent to several companies, including Peatross Service Company. John Assmar was a real estate broker.

In 1986, Allen agreed to pay Assmar fifteen percent of the gross proceeds of any service contracts Assmar obtained on behalf of Allen's companies. In 1986, Assmar, acting on behalf of

Peatross, began a pilot sanitation and pest control program for two Atlanta public schools. By the 1988-89 school year, Allen's companies provided pest control and other services to all 113 Atlanta public schools.

In mid-1988, Assmar died. Shortly thereafter, Allen paid more than $30,000 to Assmar's widow as Assmar's commission for the remainder of 1988. Although this commission grew out of Assmar's role in obtaining Allen's contracts with the school system, by the time of Assmar's death, he was doing virtually nothing to assist in the performance of the contracts.

After Assmar's death, but prior to the end of 1988, Waymer approached Allen and told him that he and Assmar had been partners and that he wanted to assume Assmar's role in Allen's school system contracts. Allen responded that he had already paid Assmar's widow the fifteen percent commission for 1988. Waymer approached Allen again at the end of 1988. At that time, Allen agreed to pay Waymer the fifteen percent if Waymer provided him with an assurance from the school system that Waymer could do business with Allen at the same time that he was a member of the Board.

Waymer told Dr. Woodrow Wilson, the Associate Superintendent of the Atlanta school system, that he was considering doing business with someone who did business with the school system and asked his advice. Because Waymer was in the real estate business, Wilson assumed Waymer was talking about real estate work. He advised Waymer that it was allowable if the other party's business with the school system was accomplished through a sealed bid procedure. Wilson further advised Waymer to abstain if matters came before the Board involving that business and to disclose the relationship to the Board and Superintendent. Waymer then wrote Wilson a letter stating that he was engaged in real estate and marketing activities with Allen, that Waymer had done consulting work for Allen since 1986, and that Waymer would make full disclosure of his relationship with Allen. Waymer's letter did not inform Wilson that Allen would be paying Waymer fifteen percent of Allen's

companies' proceeds from the contract with the school system and that Waymer would be required to perform almost no services for Allen in order to receive the payments. Neither Waymer nor Wilson took the matter before the entire Board.

From the beginning of 1989 to the end of 1991, Allen paid Waymer by checks made payable to Elloree Real Estate Company. All of the checks were deposited into the Elloree business account. Each time Waymer deposited a check from Allen's companies into the Elloree account, he wrote one or more checks on that account to himself and deposited the money in his personal account. In all, Allen paid Waymer more than $200,000.

B. ***Procedural History***

In April 1993, a superseding indictment charged Waymer with twenty-four counts of mail fraud, in violation of 18 U.S.C.A. §§ 1341 (West 1984 and Supp. 1994) and 1346 (West Supp. 1994), and eleven counts of money laundering, in violation of 18 U.S.C.A. § 1956(a)(1)(B)(i) (West Supp. 1994). The mail fraud counts alleged (1) a scheme to defraud the citizens of Atlanta of Waymer's honest services and (2) a scheme to defraud Allen of money and property. The money laundering counts relied upon the mail fraud counts as the specified unlawful activity constituting the source of the laundered proceeds. Waymer pleaded not guilty.

At the trial, which commenced in July 1993, the court granted a motion for judgment of acquittal on two of the mail fraud counts. The jury returned guilty verdicts on all remaining mail fraud counts based on the scheme to defraud the citizens of Atlanta of Waymer's honest services.[1] Waymer was also convicted on all money laundering counts. He was sentenced to concurrent terms of thirty-three months' imprisonment.

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[1] The jury was deadlocked on Waymer's guilt regarding the alleged scheme to defraud Allen of money and property.

Waymer raises the following issues on appeal: (1) whether section 1346 is unconstitutionally vague or overbroad; (2) whether the school system's mailing of checks to Allen's companies satisfies the mailing requirement of section 1341; (3) whether the evidence was sufficient to establish mailing of the twenty-two checks at issue; and (4) whether the fact that Waymer was being paid fifteen percent of the proceeds of Allen's companies' contracts with the Board was "material."[2]

II. DISCUSSION

A. *Vagueness and overbreadth challenges to section 1346*

Federal law prohibits the use of the mails in furtherance of a scheme to defraud. 18 U.S.C.A. § 1341. To prove mail fraud, the government must show that the accused (1) intentionally participated in a scheme or artifice to defraud and (2) used the United States mails to carry out that scheme or artifice. *United States v. Hooshmand*, 931 F.2d 725, 731 (11th Cir. 1991). The "honest services amendment" to the mail fraud statute, 18 U.S.C.A. § 1346, allows the United States to predicate a mail fraud prosecution on a "scheme or artifice to deprive another of the intangible right of honest services."[3] Waymer contends that

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[2] In addition to those listed above, Waymer raises numerous other issues. After careful review of the record, we conclude that Waymer's contentions regarding those other issues are without merit and do not warrant discussion. Accordingly, we summarily affirm the district court as to all issues not herein discussed.

[3] In 1988, Congress enacted section 1346, overriding the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). *McNally* had held that the mail fraud statute did not criminalize schemes to defraud citizens of their rights to honest government. *Id.* at 359, 107 S.Ct. at 2881. Congress' purpose in enacting section 1346 was to restore the mail fraud statute to its pre-*McNally* position by allowing mail fraud convictions to be predicated on deprivations of honest services. *United States v. Martinez*, 905 F.2d 709, 715 (3rd Cir. 1990).

section 1346 is unconstitutionally vague and overbroad. Our review is *de novo*.

1. ***Vagueness***

Because "honest services" are not defined in the mail fraud statute, Waymer contends that section 1346 is unconstitutionally vague. A statute is not unconstitutionally vague if it "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). Waymer's void-for-vagueness challenge to section 1346 does not involve the First Amendment; therefore, we review section 1346 only as applied in the instant case. *United States v. Awan*, 966 F.2d 1415, 1424 (11th Cir. 1992). In other words, we need only examine the vagueness of the statute in light of the particular facts of this case. *Id.*

The constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of *mens rea*. *Colautti v. Franklin*, 439 U.S. 379, 395, 99 S.Ct. 675, 685, 58 L.Ed.2d 596 (1979). "A statutory requirement that an act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *United States v. Conner*, 752 F.2d 566, 574 (11th Cir.) (quoting *Screws v. United States*, 325 U.S. 91, 101-02, 65 S.Ct. 1031, 1035-36, 89 L.Ed. 1495 (1945) (Douglas, J., concurring)), *cert. denied sub nom., Taylor v. United States*, 474 U.S. 821, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985); see also *United States v. Margiotta*, 688 F.2d 108, 129 (2d Cir.1982) ("[t]he broad language of [section 1341], intended by Congress to be sufficiently flexible to cover the wide range of fraudulent schemes mankind is capable of devising, is not unconstitutionally vague because section 1341 contains the requirement that the defendant must have acted willfully and with a specific intent to defraud."),

cert. denied, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983).

Applying that principle to this case, we note that to convict a person of mail fraud, the government must prove specific intent to defraud. 18 U.S.C.A. § 1341 (West Supp. 1994). *Hooshmand*, 931 F.2d at 732. Here, the jury found that Waymer specifically intended to commit a fraud on Atlanta's citizens. Waymer does not maintain that the jury was improperly instructed as to specific intent. Nor does he argue that the evidence was insufficient to support the jury's conclusion that he specifically intended to defraud the citizens of Atlanta of his honest services. Therefore, his vagueness challenge must fail. Accordingly, we hold that the term "honest services" in section 1346, as applied to Waymer, is not unconstitutionally vague.

2. ***Overbreadth***

Waymer contends that section 1346 could be used to prosecute expression protected by the First Amendment and, thus, is facially overbroad. Application of the overbreadth doctrine is employed as a last resort and is not to be invoked when a limiting construction has been or could be placed on the challenged statute. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). In cases like this one, where the statute at issue regulates conduct and not merely speech, the statute will not be struck down unless its overbreadth is "not only real, but also substantial in relation to the statute's plainly legitimate sweep." *Id.* If a conduct- regulating statute reflects legitimate governmental interests and is not substantially overbroad, whatever overbreadth does exist should be cured on a case-by-case basis. *Id.*

We see no basis for facial invalidation of section 1346 on overbreadth grounds. Section 1346 effectuates the legitimate governmental aim of punishing those who use the mails to carry out fraudulent schemes to deprive others of their intangible rights to honest services. Assuming arguendo that certain marginal applications of section 1346 would impermissibly intrude on First Amendment rights, we hold that such potential problems with

section 1346 are insubstantial when judged in relation to the statute's plainly legitimate sweep. Thus, defects in the honest services amendment to the mail fraud statute can be effectively addressed on a case-by-case basis. Accordingly, section 1346 is not facially overbroad.

B. *The Mailing Requirement*

The federal mail fraud statute does not purport to reach all frauds; rather, it aims at instances where the use of the mails is "part of the execution of the fraud." *Schmuck v. United States*, 489 U.S. 705, 710, 109 S.Ct. 1443, 1447, 103 L.Ed.2d 734 (1989) (quoting *Kann v. United States*, 323 U.S. 88, 95, 65 S.Ct. 148, 151, 89 L.Ed. 88 (1944)). Thus, "mailing" is a required element of the crime of mail fraud. To satisfy the mailing requirement, however, the use of the mails need not be an essential element of the scheme. *Schmuck*, 489 U.S. at 710, 109 S.Ct. at 1447. It is sufficient for the mailing to be "incident to an essential part of the scheme" or "a step in the plot." *Id.* at 711, 109 S.Ct. at 1448 (quoting *Badders v. United States*, 240 U.S. 391, 394, 36 S.Ct. 367, 368, 60 L.Ed. 706 (1916)).

1. *Payment of a Lawful Debt*

In this case, the government met the mailing requirement by showing that the Board's payments to Allen's companies were accomplished by use of the mails. Waymer contends that because the school system had a legal obligation to pay Allen, the mailing of checks in payment of that legal debt cannot satisfy the mailing requirement.

Waymer's contention is foreclosed by the Supreme Court's decision in *Schmuck*, which expressly rejected the claim that a routine or innocent mailing cannot supply the mailing element of the mail fraud offense. 489 U.S. at 714-15, 109 S.Ct. at 1449-50 (1988). *Schmuck* involved a scheme whereby the defendant would purchase used cars, roll back their odometers, and sell them to dealers for inflated prices. The dealers, in turn, would sell the cars to consumers for prices which reflected the earlier fraud. In order to complete the resale transactions between the

dealers and the consumers, title had to be transferred to the consumers; this was accomplished by mailing a title application form to the Wisconsin Department of Transportation.

The Supreme Court held that although it was an innocent act in itself, the mailing of the title applications supplied the mailing element for the defendant's mail fraud conviction. The Court wrote:

> Under these circumstances, we believe that a rational jury could have found that the title-registration mailings were part of the execution of the fraudulent scheme, a scheme which did not reach fruition until the retail dealers resold the cars and effected transfers of title. Schmuck's scheme would have come to an abrupt halt if the dealers either had lost faith in Schmuck or had not been able to resell the cars obtained from him. These resales and Schmuck's relationships with the retail dealers naturally depended on the successful passage of title among the various parties. Thus, although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck's scheme.

Id. at 712, 109 S.Ct. at 1448.

This case presents an even stronger factual scenario for finding mailing than did *Schmuck*. In *Schmuck*, despite the fact that the mailing took place after the defendant had already received the desired benefit from his fraud, the Supreme Court held that the mailings were in furtherance of his overall fraudulent scheme. Here, by contrast, the checks mailed to Allen were the very source of the payments to Waymer. Unless and until Allen got paid, Waymer could not get paid.[4] In short, because the success

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[4] *Cf. United States v. Maze*, 414 U.S. 395, 402, 94 S.Ct. 645, 649, 38 L.Ed.2d 603 (1974) (no mail fraud despite foreseeable mailing of bills to credit card owner, because defendant's fraudulent scheme was complete when he used the stolen credit card to receive the object of the

of Waymer's scheme to defraud Atlanta's citizens directly depended on Allen's being paid, and because Allen was paid by mail, the mailings in this case satisfy the mailing requirement of section 1341.

2. *Sufficiency of the Evidence of Mailing*

Waymer next contends that there was insufficient evidence to conclude that the twenty-two checks at issue in this case were, in fact, mailed from the school system to Allen. We review challenges to the sufficiency of the evidence *de novo*. *Hooshmand*, 931 F.2d at 733. In so doing, we review the evidence, including all reasonable inferences and credibility choices, in the light most favorable to the government and decide whether a reasonable factfinder could find guilt beyond a reasonable doubt. *Id.* We need not rule out every hypothesis of innocence; a jury is free to choose among reasonable constructions of the evidence. *Id.*

The Atlanta school system paid Allen's companies for his services out of two accounts, the general fund and the cafeteria

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fraud); *Parr v. United States*, 363 U.S. 370, 393, 80 S.Ct. 1171, 1184, 4 L.Ed.2d 1277 (1960) (defendant who made unauthorized use of school district's credit card did not commit mail fraud, despite the fact that the oil company which issued the credit card mailed the invoices to the school district for payment); *Kann*, 323 U.S. at 94, 65 S.Ct. at 150 (mailing requirement was not met where defendants cashed fraudulently obtained checks at local bank and local bank then mailed checks to drawee banks for collection; "it was immaterial to [the defendants], or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank"). As this Court has noted, "if a defendant has been able to take possession of the object of the fraud and if the fraud is then at an end, further mailings 'involve[] little more than post-fraud accounting among the potential victims of the various schemes, and the long-term success of the fraud [does] not turn on which of the potential victims [bears] the ultimate loss.'" *United States v. Smith*, 934 F.2d 270, 272 (11th Cir. 1991) (quoting *Schmuck*, 489 U.S. at 714, 109 S.Ct. at 1449).

account. Larry Washington and Mary Bright each supervised one of these accounts. Both testified that the customary practice was for the school system to mail checks to vendors. However, Washington testified that on three or four occasions between 1986 and 1992, checks drawn on the general fund were picked up personally by someone from Allen's companies. Bright testified that 20% of the time preceding the last year and 50% of the time in the last year, checks from the cafeteria account were picked up rather than mailed. Bright and Washington further testified that their approval was required for checks to be picked up, but that they kept no records of which checks were mailed and which were picked up.

Mailing can be proved through circumstantial evidence. *United States v. Metallo*, 908 F.2d 795, 798 (11th Cir. 1990), *cert. denied*, 503 U.S. 940, 112 S.Ct. 1483, 117 L.Ed.2d 625 (1992). Proof of a routine practice of using the mail to accomplish a business end is sufficient to support a jury's determination that mailing occurred in a particular instance. *Id.* This Court has not previously addressed the issue of whether significant deviations from a claimed routine practice of mailing render the evidence insufficient to support a finding of mailing in a particular instance. However, the Fifth Circuit has written:

> Where, for example, the usual business practice includes the frequent use of private couriers . . . the inference that the . . . mails . . . were employed in executing the fraud is cast into serious doubt. Absent other probative evidence to show that a mailing . . . occurred . . . a jury cannot reasonably overcome the presumption of innocence.

United States v. Moody, 903 F.2d 321, 332 (5th Cir. 1990).

In this case, we need not decide whether the testimony of Bright and Washington, standing alone, would be sufficient to establish that the checks at issue were mailed, because the government presented additional evidence of mailing. Specifically, the government offered proof of more than four days' delay between the date that each of the twenty-two checks at issue was cut by the school system and the date that the same check was

deposited into one of Allen's companies' accounts.[5] The record contains evidence which shows that the school system normally would write a check on one day and then mail it on the next. Allen testified that his customary practice was to deposit checks soon after they were received because "we are a small company and our funds are needed in other areas." The Fifth Circuit has held that time delay evidence is probative of the method of transport and that three or four days' time delay is in accordance with the ordinary degree of postal efficiency. *Moody*, 903 F.2d at 332-33. We agree with the Fifth Circuit. Such evidence supports an inference of mailing.

Viewed in the light most favorable to the government, the evidence in this case was sufficient to support the finding of mailing. Taken together, the following evidence supports the jury's conclusion: (1) evidence of the school system's sometimes-broken custom of mailing checks to Allen's companies; (2) testimony regarding the school system's practice of cutting a check on one day and mailing it on the next; (3) Allen's testimony that his companies typically deposited checks as soon as they were received; and (4) evidence that there were more than four days' delay between the date of the school system's cutting and the date of Allen's companies' depositing the twenty-two checks at issue in this case. Accordingly, we hold that the evidence was sufficient for the jury to decide beyond a reasonable doubt that the twenty-two checks at issue in this case were mailed.

C. *Materiality of the Undisclosed Information*

A defendant's breach of a fiduciary duty may be a predicate for a violation of the mail fraud statute where the breach entails the violation of a duty to disclose material information. *Margiotta*, 688 F.2d at 127-28. In other words, "[f]raud, for

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[5] The original indictment charged forty-six counts of mail fraud, but the superseding indictment charged only twenty-four. The charges that were dropped were for checks for which the delay was four days or less.

purposes of a mail fraud conviction, may be proved through the defendant's non-action or non-disclosure of material facts intended to create a false and fraudulent representation." *United States v. O'Malley*, 707 F.2d 1240, 1247 (11th Cir. 1983). An affirmative duty to disclose need not be explicitly imposed; it may instead be implicit in the relationship between the parties. *Margiotta*, 688 F.2d at 128. *See also United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987) ("[T]he affirmative duty to disclose material information arises out of a government official's fiduciary relationship to his or her employer, whether as a public or as a private employee.").

Waymer contends that his general fiduciary duty to the citizens of Atlanta did not require him to disclose that he was receiving fifteen percent of the proceeds from Allen's companies' contracts with the Atlanta school system and that he performed virtually no services in exchange for those payments. In other words, he maintains that the information he withheld was not material. Waymer correctly asserts that this is not a case of a fiduciary's complete failure to disclose. He also rightly points out that when he consulted with Wilson about his plans to have a "business relationship" with Allen, Wilson assumed that the relationship would involve compensation of some sort. On the basis of these facts, Waymer contends that what he failed to disclose were minor details concerning how that compensation was to be calculated. We cannot agree.

For a School Board member to be receiving a direct and substantial cut from a vendor's contract with the school system in exchange for the performance of virtually no services so obviously smacks of impropriety that it can hardly be characterized as a minor detail of which the Board need not be apprised. The fact that Allen's companies could afford to pay Waymer--who did nothing to help Allen procure or retain the school board contracts and virtually nothing to help Allen perform on those contracts--fifteen percent of the proceeds of the contracts strongly suggests that there were at least fifteen percent of unnecessary expenses in Allen's bids for the contracts. Had the Board known this, it likely would have re-bid the contracts at a

considerable savings to the citizens of Atlanta. Accordingly, we find no merit in Waymer's contention that as a fiduciary to the citizens of Atlanta, he had no duty to disclose the fact that he was receiving fifteen percent of what the school board was paying Allen's companies ostensibly for pest control and other services.

III. CONCLUSION

For the foregoing reasons, Waymer's convictions and sentence are **AFFIRMED.**

[Filed April 28, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

v.

ROBERT W. WAYMER

Criminal Indictment No. 92-CR-349
(Superseding)

THE GRAND JURY CHARGES THAT:

COUNTS ONE — TWENTY-TWO

1. From in or about January, 1989, through in or about December 31, 1991, in the Northern District of Georgia, and elsewhere, the defendant, ROBERT W. WAYMER, devised and intended to devise a scheme and artifice to defraud (1) the citizens of the City of Atlanta of their right to his honest services, that is, the loyal, faithful, disinterested and unbiased services, decisions, actions, and performance of his official duties as an elected member of the Atlanta Board of Education [Board] free from corruption, partiality, willful omission, bias, dishonesty, official misconduct, conflict of interest, and fraud and (2) Buddy Allen, doing business as Environmental Pollution Control, Peatross Service Corporation, Allen Company, Allen Services, and Allen Service Company, and to obtain money from Buddy Allen by means of false and fraudulent representations and promises, as well as by omissions of material facts, well knowing and having reason to know that said representations and promises were and would be false when made and that said omissions were and would be material.

2. It is pertinent to this indictment that:

a. Beginning in 1986, Buddy Allen, doing business as Environmental Pollution Control, Peatross Service Corporation, Allen Company, Allen Services, and Allen Service Company, all located at 195 Cliftwood Drive, Atlanta, Georgia, provided to the Board, pest control, steam cleaning and other services related to sanitation and cleaning of the public schools of the City of Atlanta. Allen was awarded a contract to provide such services in late 1986.

b. John Assmar assisted Allen in acquiring and servicing the above referenced contract. Assmar and Allen had an agreement that Allen would pay Assmar fifteen percent (15%) of the gross receipts that Allen received from the Board for services provided under the contract in payment for Assmar's assistance to Allen. Pursuant to this agreement, in 1987 and 1988 Allen paid Assmar fifteen percent (15%) of the proceeds that he received from the contract.

c. John Assmar died in June 1988.

3. It was part of the scheme and artifice to defraud that defendant ROBERT W. WAYMER was an elected member of the Atlanta Board of Education.

4. It was further a part of the scheme and artifice to defraud that after Assmar's death, defendant ROBERT W. WAYMER falsely told Buddy Allen that he and Assmar had been partners in the agreement that Allen had with Assmar regarding the contract that Allen had with the Board.

5. It was further a part of the scheme and artifice to defraud that defendant ROBERT W. WAYMER told Allen that he wanted to take Assmar's place in representing Allen in his contractual agreement for pest control services with the Board.

6. It was further a part of the scheme and artifice to defraud that in or about January 1989, Allen agreed to pay defendant Robert W. Waymer the fifteen percent (15%) of the contract proceeds that had been paid to Assmar previously.

7. It was further part of the scheme and artifice to defraud that defendant ROBERT W. WAYMER would and did give assurances to Buddy Allen that full disclosure of their financial relationship had been made to the Associate Superintendent of the Board, when in fact such disclosure had not been made.

8. It was further a part of the scheme and artifice to defraud that between January, 1989, and December 31, 1991, defendant ROBERT W. WAYMER received payments from Buddy Allen, doing business as Environmental Pollution Control, Peatross Service Corporation, Allen Company, Allen Services, and Allen Service Company, all located at 195 Cliftwood Drive, Atlanta, Georgia, totalling $221,384.71. The payments were made pursuant to the agreement reached between Allen and the defendant in January 1989.

9. It was further part of the scheme and artifice to defraud that defendant ROBERT W. WAYMER would and did conceal from the Board his financial relationship with Allen in violation of his fiduciary duty to fully disclose any personal interest which was in apparent conflict with his duties as a member of the Board.

10. For the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendant, ROBERT W. WAYMER, did on the dates set forth below, knowingly cause checks, made payable to Buddy Allen, doing business as Environmental Pollution Control (EPC), Peatross Service Corporation (PSC), Allen Company (AC), Allen Services (AS), and Allen Service Company (ASC), all located at 195 Cliftwood Drive, Atlanta, Georgia, drawn against the First National Bank of Atlanta and the Citizens and Southern National Bank, on the account of The Board of Education of the City of Atlanta to be delivered within the Northern District of Georgia according to the direction thereon by the United States Postal Service.

COUNT	*DATE*	*PAYEE*	*PAYOR*	*CHECK #*	*AMOUNT OF CHECK*
1	10/16/89	Peatross Service Company	Board of Education City of Atlanta	059231	$ 5,500.00
2	1/3/90	Peatross Service Company	Board of Education City of Atlanta	064050	$ 1,050.00
3	1/10/90	Peatross Service Company	Board of Education City of Atlanta	003795	$50,600.00
4	1/11/90	Peatross Service Company	Board of Education City of Atlanta	064709	$ 6,000.00
5	1/30/90	Peatross Service Company	Board of Education City of Atlanta	004372	$36,666.96
6	3/6/90	Peatross Service Company	Board of Education City of Atlanta	004489	$35,000.28
7	7/5/90	Peatross Service Company	Board of Education City of Atlanta	000252	$36,666.96
8	9/18/90	Peatross Service Company	Board of Education City of Atlanta	000330	$57,450.37
9	12/7/90	Peatross Service Company	Board of Education City of Atlanta	009297	$10,864.00
10	1/17/91	Peatross Service Company	Board of Education City of Atlanta	012027	$10,864.00
11	2/11/91	Peatross Service Company	Board of Education City of Atlanta	000809	$47,508.00

COUNT	*DATE*	*PAYEE*	*PAYOR*	*CHECK #*	*AMOUNT OF CHECK*
12	2/14/91	Peatross Service Company	Board of Education City of Atlanta	013828	$10,864.00
13	2/26/91	Peatross Service Company	Board of Education City of Atlanta	000867	$47,936.00
14	3/12/91	Peatross Service Company	Board of Education City of Atlanta	015929	$10,864.00
15	4/18/91	Peatross Service Company	Board of Education City of Atlanta	018457	$15,834.00
16	5/30/91	Peatross Service Company	Board of Education City of Atlanta	021754	$10,864.00
17	8/20/91	Peatross Service Company	Board of Education City of Atlanta	025996	$16,301.00
18	9/26/91	Peatross Service Company	Board of Education City of Atlanta	027907	$16,301.00
19	10/4/91	Peatross Service Company	Board of Education City of Atlanta	001661	$47,508.00
20	10/29/91	Peatross Service Company	Board of Education City of Atlanta	001719	$46,652.00
21	11/5/91	Peatross Service Company	Board of Education City of Atlanta	001742	$856.00
22	12/6/91	Peatross Service Company	Board of Education City of Atlanta	001855	$47,508.00

all in violation of Title 18, United States Code, Sections 1341 and 1346.

COUNTS TWENTY-THREE — THIRTY-THREE

From in or about January 1989, through in or about December 1991, within the Northern District of Georgia, and elsewhere, the defendant, ROBERT W. WAYMER, did knowingly and willfully conduct, attempt to conduct and cause to be conducted financial transactions with a financial institution whose activities affected interstate commerce, to wit, the deposit of eleven (11) checks to the Fidelity National Bank, Decatur, Georgia, all of which involved the proceeds of specified unlawful activity, that is, the unlawful use of the United States Postal Service in executing the scheme and artifice to defraud, as further described in Counts One through Twenty-Two, in violation of Title 18, United States Code, Sections 1341 and 1346, knowing that the transactions were designed in whole and in part to conceal and disguise the nature, source, ownership, and control of the proceeds of the specified unlawful activity and while conducting, attempting to conduct and causing to be conducted such financial transactions, the defendant, ROBERT W. WAYMER, knew that the property involved in the financial transactions, that is, funds in the amounts set forth below represented the proceeds of specified unlawful activity:

COUNT	*DATE OF CHECK*	*DATE OF DEPOSIT*	*PAYOR*	*DEPOSITED TO*	*ACCOUNT*	*PAYEE AMOUNT*
23	1/17/90	1/18/90	PSC	Eloree Real Estate	Fidelity National Bank	$12,420.00
24	2/19/90	2/23/90	PSC	Eloree Real Estate	Fidelity National Bank	$5,500.00
25	3/20/90	3/26/90	PSC	Eloree Real Estate	Fidelity National Bank	$5,500.00
26	7/13/90	7/17/90	PSC	Eloree Real Estate	Fidelity National Bank	$5,500.00
27	9/15/90	9/18/90	ASC	Eloree Real Estate	Fidelity National Bank	$10,000.00
28	1/21/91	1/22/91	ASC	Eloree Real Estate	Fidelity National Bank	$4,480.00
29	3/15/91	3/18/91	ASC	Eloree Real Estate	Fidelity National Bank	$4,480.00
30	4/24/91	4/24/91	ASC	Eloree Real Estate	Fidelity National Bank	$4,977.00
31	10/16/91	10/16/91	AS	Eloree Real Estate	Fidelity National Bank	$4,993.00
32	11/19/91	11/19/91	ASC	Eloree Real Estate	Fidelity National Bank	$3,993.40
33	12/19/91	1/18/90	PSC	Eloree Real Estate	Fidelity National Bank	*

* (Note: Check to Eloree made to amount of $4,993.40 but WAYMER split the deposit) Fidelity National Bank $4,493.40

all in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i).

COUNTS THIRTY-FOUR — THIRTY-FIVE

Paragraphs one through nine of counts one through twenty-two above are incorporated by reference.

For the purpose of executing and in order to effect the aforesaid scheme and artifice to defraud and attempting to do so, the defendant, ROBERT W. WAYMER, did on the dates set forth below, knowingly cause to be delivered, within the Northern District of Georgia, according to the direction thereon by the United States Postal Service the listed correspondence.

COUNT	*DATE*	*ADDRESSED TO*	*FROM*
34	5-1-89	Buddy Allen 195 Cliftwood Drive Atlanta, Georgia	Robert W. Waymer
35	5-12-89	Buddy Allen 195 Cliftwood Drive Atlanta, Georgia	Woodrow Wilson, Jr.

all in violation of Title 18, United States Code, Sections 1341 and 1346.

A_____BILL

/s/ illegible_____
FOREPERSON

/s/Joe D. Whiteley
JOE D. WHITLEY
UNITED STATES ATTORNEY

/s/ Carolyn J. Adams for
WILLIAM L. MCKINNON, JR.
ASSISTANT UNITED STATES ATTORNEY

/s/ Carolyn J. Adams
CAROLYN J. ADAMS
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
Northern District of Georgia

UNITED STATES OF AMERICA

v.

Case Number
1:92-CR-349-01-RHH

ROBERT W. WAYMER
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ROBERT W. WAYMER, was represented by Dwight Thomas and Henry Johnson.

On motion of the United States the court has dismissed count(s) 34 and 35.

The defendant was found guilty on count(s) 1-33 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Count Number(s)
18 USC 1341, 1346	Mail Fraud	1-22
18 USC 1956	Money Laundering	23-33

As pronounced on November 10, 1993, the defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $1,650, for count(s) 1-33, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution,

costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 15th day of November, 1993.

/s/ Robert H. Hall
ROBERT H. HALL
United States District Judge

Defendant's Soc. Sec. No.: 239-58-8549
Defendant's Date of Birth: 05/10/38
Defendant's address: 1120 Flamingo Drive, Atlanta, GA 30311

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

vs.

Criminal Action No.
1:92-CR-349-01-RHH

ROBERT W. WAYMER

ORDER

Upon consideration of Defendant's motion for new trial in the above entitled action;

IT IS HEREBY ORDERED that Defendant's motion is DENIED.

SO ORDERED THIS [20th] day of OCTOBER, 1993.

/s/ Robert H. Hall
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

[Filed: Sept. 7, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9319

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT W. WAYMER,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19___, _____ F.2d_____).

Before: HATCHETT and COX, Circuit Judges, JOHNSON, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT: /s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

CONSTITUTIONAL STATUTORY PROVISIONS

U.S. Const., Amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000,000 or imprisoned not more than thirty years, or both.

18 U.S.C. § 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Supreme Court, U.S.
FILED
FEB 5 1996
CLERK

No. 95-887

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ROBERT W. WAYMER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE – ATLANTA CHAPTER IN SUPPORT OF THE PETITION

ANTONIO L. THOMAS
(Counsel of Record)
151 Ponce DeLeon Ave. N.E.
Suite 201
P.O. Box 54867
Atlanta, GA 30308
(404) 881-0164

MELVIN ROBINSON
41 Marietta Street
Suite 727
Atlanta, GA 30303
(404) 586-0696

Counsel for Amicus Curiae

7pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1346 (1988), which defines mail and wire fraud as including schemes to deprive others of "the intangible right of honest services," denies public officials and other fiduciaries prosecuted under its authority their Fifth Amendment due process right to notice of what conduct constitutes a crime.

2. Whether a public official who has failed to fully disclose a private business relationship may be convicted of mail or wire fraud for depriving his constituents of "the intangible right of honest services," 18 U.S.C. § 1346 (1988), absent any finding that he sought to use the authority of his office to promote the private business relationship.

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association for the Advancement of Colored People for the City of Atlanta, the Atlanta chapter of the National NAACP, has for the past seven decades been devoted to promoting equal rights for African-Americans. It is also committed to protecting the integrity and vitality of the electoral process at all levels of government.

The central issue in this case -- whether 18 U.S.C. § 1346 (1988) is unconstitutionally vague -- is of great concern to *amicus*. This provision fails to give state and local elected officials adequate guidance as to when a mere failure to disclose information, such as information about personal business dealings, may give rise to a federal mail or wire fraud prosecution for depriving constituents of their "intangible right of honest services."

Amicus discerns two particularly troubling consequences of the continued enforcement of Section 1346. First, the vagueness of the statute may well "encourage [its] arbitrary and discriminatory enforcement," *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), at a very time when the perception, if not the reality, is that prosecutors are increasingly targeting African-American public officials. Second, as a result of the enforcement of the statute against elected officials such as petitioner here, others may be discouraged from seeking state or local office.

SECTION 1346 THREATENS SELECTIVE PROSECUTION AGAINST LOCAL GOVERNMENT OFFICIALS

Section 1346 defines mail and wire fraud to include schemes to deprive others of "the intangible right of honest services." 18 U.S.C. § 1346 (1988). The statute provides no further definition, however, of what constitutes "honest services," or what conduct

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[1] Counsel for both petitioner Robert Waymer and respondent the United States have consented to the filing of this brief. *Amicus* has filed those consents with the Clerk of this Court.

may give rise to prosecution for depriving others of one's "honest services."

It is particularly unclear when a public official's mere failure to disclose information about his private business dealings may support a criminal conviction under this provision. The statute itself provides no guidance at all. The courts have said only that the undisclosed information must somehow be "material." *See, e.g, United States v. Waymer*, 55 F.3d 564, 571 (11th Cir. 1995). But "material" to what? In this case, for example, the Eleventh Circuit did not require that petitioner's personal business dealings — the information that he only partially disclosed — be "material" to any matter that actually came before the Atlanta school board during his tenure. The concept of materiality does not, therefore, resolve the uncertainty over what Section 1346 criminalizes.

The vagueness of the "honest services" provision has been frequently noted by judicial scholars. One commentator has characterized this "statutory right to honest services," for example, as "an undefined, amorphous right with uncertain boundaries." Geraldine Szott Moohr, *Mail Fraud And The Intangible Rights Doctrine: Someone To Watch Over Us*, 31 HARV. J. LEGIS. 153, 171 (1994); *see also, e.g.*, Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature Of The Mail Fraud Statute*, 36 B.C. L. REV. 435, 464 (1995) (Section 1346 fails to "clearly describe[] the scope of the perceived harm and the nature of the acts that will subject a person or entity to federal criminal prosecution"); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 153 (1990) (Section 1346, "with its ambiguous language concerning 'intangible rights of honest services,' . . . expands the vagueness problems of the mail fraud statute").

Indeed, Section 1346 presents the same vagueness problems that previously raised concerns under the judicially created "honest services" doctrine: It fails to provide "even the vaguest contours of the legal obligations created beyond the obligation to

conduct governmental affairs 'honestly' or 'impartially,' to ensure one's 'honest and faithful participation' in government and to obey 'accepted standards of moral uprightness, fundamental honesty, fair play and right dealing.'" *United States v. Margiotta*, 688 F.2d 108, 142-43 (2d Cir. 1982) (Winter, J., concurring in part, dissenting in part) (quoting *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir.), *aff'd in relevant part*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980)), *cert. denied*, 461 U.S. 913 (1983). This leaves juries "free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes." *Id.* at 142; *see also Carpenter v. United States*, 484 U.S. 19, 25 (1987) (noting "ethereal" nature of judicially created right to honest services).

The vagueness of Section 1346 — a statute that applies to all fiduciaries, but that has particular application to public officials — presents two potential evils: selective prosecution of disfavored officials and diminished participation in the political process.

First, as this Court has recognized on numerous occasions, a vague statute "lends itself to selective enforcement against unpopular causes" and unpopular individuals. *NAACP v. Button*, 371 U.S. 415, 435 (1963); *accord Kolender v. Lawson*, 461 U.S. at 357; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972). In his dissenting opinion in *Margiotta*, Judge Winter noted this danger with respect to prosecutions under the "honest services" doctrine, which he described as "lodg[ing] unbridled power in federal prosecutors to prosecute political activists." 688 F.2d at 144; *see also id.* at 143 (noting "the potential for abuse through selective prosecution and the degree of raw political power the freeswinging club of mail fraud affords federal prosecutors"). Or, as Professor Henning put it in discussing Section 1346, "[b]y not defining the scope of the statute," Congress has given federal prosecutors "a general legislative grant of authority . . . to 'call them as they see them.'" Henning, *Federal Fraud*, 36 B.C. L. REV. at 465.

It is widely perceived within the African-American community that its own elected officials are at particular risk of selective prosecution. *See* Helene Cooper, *A Question of Justice: Do Prosecutors Target Minority Politicians?*, WALL STREET JOURNAL, Jan. 12, 1996, at A1, A4 (noting growing view that an official's "race can draw an added measure of zeal from accusers and prosecutors"); Clarence Lusane, *In Perpetual Motion: The Continuing Significance Of Race And America's Drug Crisis*, 1994 U. CHI. LEGAL FORUM 83, 92 (contending that "black elected officials have been disproportionately targeted for investigation by law enforcement agencies"). Clearly, if a prosecutor sought to engage in selective prosecution, whether on the basis of race or for other reasons, a vague statute such as Section 1346 would facilitate his doing so.

Second, each time a public official is prosecuted under Section 1346 for otherwise permissible conduct, other individuals may be deterred from ever seeking public office. As Professor Moohr has observed:

> The mail fraud statute chills protected First Amendment political activity because it allows the selection of certain individuals for prosecution. . . . The threat of criminal sanctions may discourage people from participating in the political process at all.

Moohr, *Mail Fraud*, 31 HARV. J. LEGIS. at 180-81.

This deterrent effect may be felt with greatest force by individuals of modest means, who cannot support their families on what they earn as a member of a city counsel or a school board, which often is treated as only a part-time position. Yet, if they are employed by or have an interest in a private entity that has any dealings with the government, they, like petitioner here, may discover only too late that they violated Section 1346's vague and amorphous disclosure obligations.

Amicus applauds the role historically played by the U.S. Department of Justice and local U.S. Attorneys in protecting the right to vote. The significance of that right is diminished,

however, by their enforcement of Section 1346 against elected officials. When Congress allows federal prosecutors to criminalize selectively the accepted behavior of elected officials, the due process rights of those officials are abridged, the confidence of the citizenry in its ability to effect change through the ballot box wanes, and the exercise of political rights is chilled. *Amicus* fears that Section 1346's vague proscription against schemes to deprive the public of its "intangible right of honest services" will inevitably cause the political process to become less vibrant and less participatory.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

ANTONIO L. THOMAS
(Counsel of Record)
151 Ponce DeLeon Ave. N.E.
Suite 201
P.O. Box 54867
Atlanta, GA 30308
(404) 881-0164

MELVIN ROBINSON
41 Marietta Street
Suite 727
Atlanta, GA 30303
(404) 586-0696

Counsel for Amicus Curiae

Supreme Court, U.S.
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(3)

No. 95-887

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT W. WAYMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

12 pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346's provision that a fraudulent scheme under the mail fraud statute "includes a scheme or artifice to deprive another of the intangible right of honest services" is unconstitutionally vague as applied to the facts of this case.

2. Whether the court of appeals correctly affirmed the mail fraud conviction of a school board member who failed to disclose the nature of his financial relationship with a vendor of services to the school system where that financial relationship would have been material to the school board in bidding on or negotiating contracts for such services.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-887

ROBERT W. WAYMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 55 F.3d 564.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1995. A petition for rehearing was denied on September 7, 1995. Pet. App. 26a. The petition for a writ of certiorari was filed on December 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on 22 counts of mail fraud, in violation of 18 U.S.C. 1341, and 11 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). He was sentenced to concurrent terms of 33 months' imprisonment on each count of conviction. The court of appeals affirmed. Pet. App. 1a-13a.

1. Petitioner Robert W. Waymer was an elected member of the Atlanta Board of Education (the Board). Peatross Service Company, a subsidiary of the Allen Service Company, of which Buddy Allen was the President and General Manager, became a supplier of services to the schools. In 1986, Allen agreed to pay John Assmar, a real estate broker, a 15% commission on the gross proceeds of any service contracts Assmar obtained on behalf of Allen's companies. In 1986, Allen, acting on behalf of Peatross, began a pilot sanitation and pest-control program for two Atlanta public schools. By the 1988-1989 school year, Allen's companies provided pest control and other services to all 113 Atlanta public schools. Pet. App. 1a-2a.

In mid-1988, Assmar died. After Assmar's death, petitioner informed Allen that he and Assmar had been partners and that he wanted to assume Assmar's role in Allen's school system contracts. Allen ultimately agreed to pay petitioner the 15% commission if petitioner provided him with an assurance from the school system that petitioner could do business with him while being a member of the Board. Pet. App. 2a.

Petitioner told Dr. Woodrow Wilson, the Associate Superintendent of the Atlanta school system, that he was considering doing business with a person who did business with the school system. Wilson advised petitioner that such a practice was permissible if the other party's business with the school system was accomplished through a sealed-bid procedure. Wilson further advised that petitioner should abstain from voting on any matters involving that business that came before the Board, and that he should disclose the relationship to the Board and to the Superintendent. Petitioner subsequently wrote to inform Wilson that he was engaged in real estate and marketing activities with Allen, that he had done consulting work for Allen since 1986, and that he would make full disclosure of his relationship with Allen. That letter did not, however, inform Wilson that petitioner would receive a 15% commission on Allen's contracts with the school system without being required to perform substantial services. Neither petitioner nor Wilson took the matter before the entire Board. From 1989 through 1991, petitioner received more than $200,000 in payments from Allen's companies. Pet. App. 2a-3a.

2. The federal mail fraud statute prohibits the use of the mails in furtherance of "any scheme or artifice to defraud." 18 U.S.C. 1341. Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals had consistently construed Section 1341 to apply to schemes intended to deprive citizens of their right to honest services from public officials. See Pet. 8. The Court in *McNally* reached the opposite conclusion, holding that Section 1341 was "limited in scope to the protection of property rights." 483 U.S. at 360. The Court stated that Congress "must speak more clearly than it has" if it

wishes to criminalize a broader range of fraudulent conduct. *Ibid.* The following year Congress amended the Criminal Code to provide that, for purposes of applying the mail fraud statute, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Pub. L. No. 100-690, § 7603, 102 Stat. 4508 (18 U.S.C. 1346).

3. Petitioner was charged with 24 counts of mail fraud, in violation of 18 U.S.C. 1341. The indictment alleged that petitioner had engaged in (1) a scheme to defraud the citizens of Atlanta of petitioner's honest services, and (2) a scheme to defraud Allen of money and property. Petitioner was also charged with 11 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i), in which the alleged mail fraud constituted the source of the laundered proceeds. Pet. App. 3a.

The district court granted a motion for judgment of acquittal on two of the mail fraud counts. The jury found petitioner guilty on all remaining mail fraud counts based on the scheme to deprive the citizens of Atlanta of petitioner's honest services, but deadlocked on petitioner's guilt regarding the alleged scheme to defraud Allen of money and property. The jury also convicted petitioner on all money-laundering counts. Pet. App. 3a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court rejected petitioner's argument that Section 1346 is unconstitutionally vague. Pet. App. 5a-6a. It explained that a statute is not unconstitutionally vague if it "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

enforcement." *Id.* at 5a (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)). Because petitioner's challenge did not involve the First Amendment, the court observed, its inquiry was limited to the question whether the statute was unconstitutionally vague as applied to the facts of the particular case. Pet. App. 5a. The court of appeals rejected the vagueness challenge, stating that a conviction under the mail fraud statute requires specific intent to defraud, and that petitioner had not contested the adequacy of either the jury instructions or the proof on the element of specific intent. *Id.* at 6a.

Petitioner also contended that his nondisclosure of the details of his business agreement with Allen could not form the basis for a mail fraud conviction, because those details were not material facts. Pet. App. 12a. The court rejected that contention, explaining that "[f]or a School Board member to be receiving a direct and substantial cut from a vendor's contract with the school system in exchange for the performance of virtually no services so obviously smacks of impropriety that it can hardly be characterized as a minor detail of which the Board need not be apprised." *Ibid.* Had the Board known that Allen's contracts were inflated by the 15% commission paid to petitioner, the court observed, "it likely would have re-bid the contracts at a considerable savings to the citizens of Atlanta." *Id.* at 12a-13a.

ARGUMENT

1. Petitioner argues (Pet. 7-15) that Section 1346's definition of mail fraud to include the use of the mails "to deprive another of the intangible right of honest services" is unconstitutionally vague, in violation of the Due Process Clause of the Fifth Amendment.

That claim is without merit and does not warrant this Court's review.*

"Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Buckley* v. *Valeo*, 424 U.S. 1, 77 (1976) (quoting *United States* v. *Harriss*, 347 U.S. 612, 617 (1954)). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. at 357. Petitioner attacks Section 1346 as vague based upon its potential to criminalize "common political practices," such as a public official's performance for political gain of an act that imposes unnecessary costs on taxpayers, or a candidate's mailing of a brochure containing a promise the candidate knows he cannot keep. See Pet. 11-12.

Under this Court's precedents, however, petitioner cannot obtain reversal of his convictions by showing that hypothetical situations may exist in which application of the statute would be ambiguous. Rather, he

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* The only other court of appeals to consider a vagueness challenge to Section 1346 has also rejected the claim. See *United States* v. *Bryan*, 58 F.3d 933, 941-942 (4th Cir. 1995). Vagueness challenges were also consistently rejected in pre-*McNally* cases applying the mail fraud statute to schemes to deprive the citizenry of intangible rights. See, *e.g.*, *United States* v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *Bohonus*, 628 F.2d 1167, 1173-1175 (9th Cir.), cert. denied, 447 U.S. 928 (1980).

can prevail only by demonstrating that the statute failed to provide clear warning that his own conduct was proscribed. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * *, so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). As the court of appeals observed in explaining why petitioner's acts were proscribed by the statute, "[f]or a School Board member to be receiving a direct and substantial cut from a vendor's contract with the school system in exchange for the performance of virtually no services so obviously smacks of impropriety that it can hardly be characterized as a minor detail of which the Board need not be apprised." Pet. App. 12a. Because "a person of ordinary intelligence," *Buckley*, 424 U.S. at 77, would know that petitioner was obligated to disclose the terms of his agreement with Allen, the application of Section 1346 did not violate due process.

2. Petitioner argues (Pet. 15-17) that an essential element of a public official's scheme to defraud based on his failure to disclose an improper financial relationship is that he have "exercised the authority of his office to advance that relationship." Pet. 15. Petitioner asserts that the court of appeals' decision conflicts with the Eighth Circuit's pre-*McNally* ruling in *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). In *Rabbitt*,

the majority leader of the Missouri House of Representatives received a ten percent commission from an architectural firm that he recommended for state contracts. He failed to disclose that interest, but he had no responsibility, and took no action, respecting the awarding of those contracts. The Eighth Circuit reversed his mail fraud conviction. The court recognized that "[t]he concept of fraud upon the public may clearly fall within the ambit of the mail fraud statute where dishonest conduct by a public official directly implicates the functions and duties of that official's public office." 583 F.2d at 1024. The court questioned, however, "[w]hether a showing of dishonesty on the part of a state official, outside his official duties, with no financial loss to the state constitutes a fraud upon the public." *Ibid.* The court distinguished other cases as involving fraudulent conduct that "deprived the public either of some potential tangible gain such as favorable contracts, or of its right to honest and fair dealing in the conduct of the officer in question, or of its right to disclosure of the officer's interest in the transaction at issue." *Id.* at 1025 (footnotes omitted).

In the instant case, petitioner failed to disclose crucial aspects of his agreement with Allen despite the Associate Superintendent's instruction that the relationship should be disclosed. The court of appeals observed, moreover, that if petitioner had made the required disclosures, the contracts with Allen's companies would likely have been rebid or renegotiated. Pet. App. 12a-13a. Had petitioner been performing honest services as a School Board member, he would not have concealed from the Board information "strongly suggest[ing] that there were at least fifteen percent of unnecessary expenses in Allen's bids

for the contracts." *Id.* at 12a. Thus, petitioner's failure to make the required disclosures "directly implicate[d] the functions and duties of that official's public office," *Rabbitt*, 583 F.2d at 1024, and "deprived the public * * * of some potential tangible gain such as favorable contracts," *id.* at 1025. Petitioner's reliance (Pet. 16) on *United States* v. *McNeive*, 536 F.2d 1245 (8th Cir. 1976), is similarly misplaced. In *McNeive* a plumbing inspector's acceptance of gratuities for the performance of his duties was held not to violate the mail fraud statute because the defendant "was not derelict in any of his affirmative duties as Chief Plumbing Inspector." *Id.* at 1252. Here, by contrast, petitioner breached his duty as a School Board member to disclose information suggesting the existence of substantial overpayments to a public contractor. Petitioner's claim therefore does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

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No. 95-887

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROBERT W. WAYMER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY FOR PETITIONER

STEPHANIE E. PARKER
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
3500 One Peachtree Center
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 521-3939

BARBARA MCDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioner

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REPLY FOR PETITIONER

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1. Respondent does not dispute that the "honest services" provision codified at 18 U.S.C. § 1346 — which defines mail and wire fraud to include schemes to deprive others of "the intangible right of honest services" — may fail to give clear warning of its application to many commonplace activities of state and local officials. *See* Brief for the United States in Opposition ("Resp. Br.") at 6-7. Nor does respondent dispute that the vagueness of this statute may present a significant question in an appropriate case.

Respondent merely contends that this is not an appropriate case on its facts. According to respondent, whether or not Section 1346 provides adequate warning to other public officials in other circumstances of what conduct may be deemed to deprive the public of its "intangible right of honest services," the statute

"provide[d] clear warning [to petitioner] that his own conduct was proscribed." Resp. Br. at 7.

The undisputed facts of the case — and simple logic — refute respondent's argument. Petitioner truthfully disclosed to Dr. Woodrow Wilson, the associate superintendent of schools, all of the following information, in writing: (i) that petitioner was engaged in business with companies that had contracts with the school district; (ii) the names of the companies and their principal; and (iii) that he had served as a sales representative and consultant to those companies since 1986. Pet. App. 2a. In response, Dr. Wilson informed petitioner, in writing, that this private business relationship would not constitute a "conflict" with his school board position so long as (i) "the company goes through the seal [sic] bid process," (ii) petitioner did "not initiate any business for [his] client with the school system," and (iii) petitioner did not vote on any matter involving the business. Trial Ex. F; *see* Pet. App. 2a-3a. Petitioner complied with all of these conditions. At no time did Dr. Wilson, or any other representative of the school district, seek any additional information from petitioner. No evidence exists that petitioner would not have provided additional information had he simply been asked.

Yet, despite the substantial disclosures that petitioner made to the school district and the unequivocal assurances that petitioner received from the school district, respondent asserts that petitioner had "clear warning" that he should have done more. The only source of this supposed warning was the vague and amorphous language of Section 1346: that petitioner should not defraud the citizens of Atlanta of their "intangible right" to his "honest services."

That is not enough. A public official like petitioner who identifies the business in which he has an interest, who discloses everything about that interest that he is asked to disclose, and who refrains from acting on any matter involving the business receives no fair notice from Section 1346 that he also must disclose the precise nature and extent of his interest. Clearly, this case

provides the Court with an appropriate vehicle in which to consider the vagueness of Section 1346.

2. Respondent erroneously suggests that petitioner is challenging Section 1346 based only on its application to "hypothetical situations." Resp. Br. at 6. In fact, petitioner is attacking Section 1346 as applied to his own situation. It is, of course, entirely appropriate for a petition for certiorari to inform the Court that review is warranted because of "the actual, practical effect of the disputed decision — its consequences for other litigants and in other situations." Speech of Chief Justice Vinson before the American Bar Ass'n (Sept. 7, 1949) (quoted in Robert L. Stern et al., *Supreme Court Practice* 354 (7th ed. 1993)).

3. Respondent cannot explain away the conflict between the decision below and the Eighth Circuit's decisions in *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979), and *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976).

In *Rabbitt*, in concluding that the majority leader of the Missouri House of Representatives did not deprive the citizens of Missouri of their right to his honest services by accepting commissions to recommend an architectural firm for state contracts, the Eighth Circuit relied on three factors: (i) that "Rabbitt did not, in his official capacity, control the awarding of state contracts to architects"; (ii) that Rabbitt did not "fail[] to carry out the duties and responsibilities of his legislative office or leadership positions for the sake of [the architectural firm]"; and (iii) that the government had failed to identify any "standard of conduct applicable to legislators which clearly required disclosure of Rabbitt's interest in the [architectural] contracts." 583 F.2d at 1026. All of these factors are equally satisfied here.

First, petitioner "did not, in his official capacity, control the awarding of [school district] contracts to [pest control services]." As the record demonstrates, at least during the period when petitioner had an interest in the Peatross company, pest control contracts were awarded and renewed at the administrative level, without being submitted to the school board for approval. To be

sure, petitioner, together with the other members of the school board, had some ultimate responsibility for the school district fisc. But Rabbitt had precisely the same sort of responsibility for the state fisc. That alone did not, in the Eighth Circuit's view, constitute "control" over the awarding of a contract.

Second, petitioner did not "fail[] to carry out the duties and responsibilities of his [school board] office . . . for the sake of [the pest control firm]." It is undisputed that petitioner did not vote on any matter involving Peatross or otherwise attempt to exercise the authority of his office on behalf of Peatross. Respondent nonetheless suggests that petitioner had an obligation to inform the school district of "information suggesting the existence of substantial overpayments to a public contractor" (*i.e.*, that he was receiving payments for doing little work). Resp. Br. at 9. But no such obligation was recognized in *Rabbitt* in strikingly similar circumstances. *See* 583 F.2d at 1021 (noting that Rabbitt received $22,538 for recommending architectural firm for three state projects; much of the money was paid in the form of a "retainer" to Rabbitt's law firm, which "did little work for the retainer"). Nowhere did the Eighth Circuit suggest that Rabbitt's "duties and responsibilities" as a state legislator included giving the state information suggesting that the architectural firm was being overpaid because its fees included commissions to Rabbitt.

Finally, respondent has failed to identify any "standard of conduct applicable to [school board members] which clearly required disclosure of [petitioner's] interest in the [pest control] contracts." The only standard that respondent relies on is the vague language of Section 1346 itself.[1]

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[1] Similarly, in declining to find a violation of the "honest services" doctrine in *McNeive*, the Eighth Circuit relied on the facts that the defendant plumbing inspector who accepted gratuities from a contractor "was not derelict in any of his affirmative duties" and did not "attempt to actively conceal" his receipt of the gratuities. 536 F.2d at 1252. As noted in the text, respondent has not suggested that petitioner was

It is thus clear that, contrary to respondent's assertions, petitioner could not have been convicted of mail fraud under the Eighth Circuit approach as articulated in *Rabbitt* and *McNeive*.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

STEPHANIE E. PARKER
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
3500 One Peachtree Center
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 521-3939

BARBARA MCDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioner

March 11, 1996

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derelict in his affirmative duties as a member of the school board, as opposed to his supposedly implicit duty to provide more detail about his business arrangement with Peatross. Nor is this a case of active concealment. There is no evidence that petitioner would not have disclosed all of that detail, and more, to the school district had he simply been asked.